Supreme Court, U.S.
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In The

Supreme Court of the United States

MATT T. KOKKONEN,

Petitioner,

v.

CARL J. HAGMAIER; DENNIS P. D'AUTREMONT; HAVEN B. SANSON; MARTIN G. HATLEY; MICHAEL ABLES; PACIFIC FINANCIAL GROUP; GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; GUARDIAN INSURANCE AND ANNUITY CORPORATION; and GUARDIAN INVESTOR SERVICES CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District, Division Six

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil litigant denied his right under the Due Process Clause of the Fifth Amendment to view and have the opportunity to refute evidence introduced against him on the merits of his case when the court, in determining motion for summary judgment, relies on evidence which was filed under seal and which the litigant's attorney, but not the litigant, is permitted to view?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed. Petitioner conducts and does business as the Matt Kokkonen Insurance Agency, a sole proprietorship. Pursuant to Rule 29.1 of the Supreme Court Rules, this brief is not filed by or on behalf of any corporation, and Petitioner is not a parent or subsidiary of any corporation, nor does he own, control or manage such a corporation, parent or subsidiary.

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PETITION FOR A WRIT OF CERTIORARI

Matt. T. Kokkonen respectfully petitions for a writ of *certiorari* to review the decision and judgment of the Court of Appeal of California, Second Appellate District, Division Six, in this case.

OPINIONS BELOW

The order of the Supreme Court of the State of California denying the petition for review (App., *infra* A-1) is reported at 199 Cal.LEXIS 8529 ___ Cal.4th ___ (1999). The opinion of the Court of Appeal of California, Second Appellate District, Division Six (App., *infra* B-1 to B-17) is unreported.

JURISDICTION

The California Supreme Court denied review of the Court of Appeal of California, Second Appellate District, Division Six, affirmance of the judgment below on December 1, 1999. The intermediate appellate court thereupon issued its *remittitur* on December 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and Supreme Court Rules 10(b) and 10(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner sued Respondents on September 30, 1991 in the Superior Court California for the County of San

Luis Obispo. That suit alleged that Respondents, who were competitors of Petitioner's in the life insurance and financial planning business on the California Central Coast, had tortiously interfered with Petitioner's business, including committing trade libel, and engaging in unfair competition.[1]

On January 14, 1994, a Confidentiality Stipulation and Order was filed in the underlying action to facilitate pre-trial discovery. The Confidentiality Stipulation and Order provided, in pertinent part, that "any party or other witness may . . . designate as confidential, any non-public documents or information that contain, refer or relate to that person's or entity's (i) trade secrets; (ii) commercially sensitive or competitively significant information; (iii) personal records or files; or (iv) personal or privileged client information as defined by Insurance Code Section 791.02, Subdivision (s) and (v)." The order continued to provide that the producing entity shall designate such material as either "confidential", in which case, its disclosure would be limited to the parties, attorneys, and experts retained by the attorneys, or "attorneys' eyes only", in which case, counsel for the party

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[1] Petitioner had previously served as the general agent for Respondent Guardian for fourteen years. This Court previously granted *certiorari* and decided issues arising from an earlier diversity action between some of the same parties to the present action, which had been removed to Federal District Court by Respondent, Guardian Insurance Company. *Kokkonen v. Guardian*, 511 U.S. 375, 128 L.Ed.2d 391, 114 S.Ct. 1673 (1994). That suit involved claims and cross-claims arising from the termination of Petitioner's fourteen year service as Respondent Guardian's general agent.

shall not disclose such information to others, even to his own client. The order provided for the filing of "confidential" and "attorneys' eyes only" information, including "transcripts of depositions, exhibits, answers to interrogatories or other papers to be filed with the court" under seal. Petitioner was excluded from attending the depositions of Respondents Dennis D'Autremont, Haven B. Sanson, and Carlton J. Hagmaier, and of third party witness, Harold K. Mosher, and the transcripts of those depositions were designated "confidential for attorneys' eyes only".

Relatedly, the State Trial Court, on August 12, 1996, entered an order on discovery motions which, *inter alia*, granted Plaintiff's motion to compel the production of certain documents, but provided that the documents whose production was being compelled "shall be inspected only by Plaintiff's counsel and/or Plaintiff's expert, and shall be produced, inspected and copied for attorneys' eyes only . . . None of the documents or information contained in the documents shall be revealed to Plaintiff. 'Attorneys' eyes only' as used herein applies for pre-trial discovery purposes only, which shall not affect the Trial Court's ability to determine the admissibility of such evidence at the time of trial."[2]

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[2] Interestingly, the Respondents' concern over the confidentiality of discovery materials lead to the Court excluding Petitioner from attending the hearing on the parties' discovery motions heard on June 4, 1996, and which resulted in entry of the August 12, 1996 order. Petitioner knows of no precedent for the exclusion of a party from a court's hearing on discovery motions, and such exclusion compounds the denial of due process rights to Petitioner resulting from the Court's order,

Respondents subsequently noticed dual motions for summary judgment and for summary adjudication for the same day as trial was to commence. Respondents' motions were accompanied and supported, in part, by evidence submitted under seal to the Court. The evidence submitted under seal included excerpts from the above-referenced depositions of Defendants d'Autremont, Sanson and Hagmaier, and of third party witness Mosher, from which depositions Petitioner had been excluded, and which, because of the designation and filing of those excerpts under seal as for "attorneys' eyes only", Petitioner had been not allowed to review. Although a copy of the sealed documents was served on Petitioner's counsel, Respondents maintained that the information was for "attorneys' eyes only" under both the Confidentiality Stipulation and Order, and the subsequent court order compelling discovery, and could not be disclosed to Petitioner.

Petitioner, in his written opposition to the Motions for Summary Judgment and Summary Adjudication, and in oral argument, objected to the proffer of evidence which was precluded from his review, and asserted in his written oppositions to the motions "that the confidential nature of the documents proffered by Defendants in support of this motion, prohibit him from confronting his accusers; as such, he is denied his constitutional rights under state and federal law, and hereby objects to this motion." Petitioner contended the "attorneys' eyes only"

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which expressly provided that "none of the documents or information contained in the documents shall be revealed to Plaintiff."

designation was only intended to apply for pre-trial discovery purposes, and was not to affect the Court's ability to determine the admissibility of the resulting loss of confidentiality of such evidence at the time of trial (or summary judgment) and, further, argued that if Defendants wanted to submit evidence which, when produced in discovery, had been designated "attorneys' eyes only", they had to consent to the declassification of that material so that Petitioner could read and review their evidence and, based upon that review, present counter facts and argument. If Defendants insisted on the evidence remaining unavailable for Petitioner's review, Petitioner contended the Court should exclude the evidence.

Notwithstanding Petitioner's objections, the Court granted the Respondents' motions, and entered judgment in favor of Respondents. Petitioner appealed, and on appeal raised as one of the grounds for reversal his claim that he had been "denied his due process rights to confront by his inability to address and review confidential documents and testimony." The California Court of Appeal, Second Appellate District, Division Six, rejected Petitioner's argument, finding that the Petitioner had waived the right to confront witnesses by entry into the pre-trial Confidentiality Stipulation and Order, and that there was no prejudice because the Petitioner's attorney was able to review the submitted evidence.[3] California

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[3] The State Court also found a waiver of the objection because Petitioner was purportedly "making the objection for the first time on appeal". (Appendix B-14.) The State Court's statement is in error: Petitioner identified and cited in his written opposition in the Trial Court the page, line and footnote of the Clerk's Transcript where he unequivocally states "that the

Court of Appeal disposed of Petitioner's due process argument in less than ten lines: "Kokkonen opines that his due process right to confrontation was violated because he was precluded from reviewing and responding to certain documents proffered in support of the summary judgment motion. The objection is waived because he stipulated that the documents were confidential, his attorneys had the documents, and he is making the objection for the first time on appeal. His reliance on *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981) is misplaced. In *Lynn*, the trial court reviewed documents *in camera* which had never been disclosed to plaintiff or counsel." (Appendix B-14.)

Petitioner thereafter sought review of the intermediate Appellate Court's decision by the Supreme Court of California, raising as his first issue for review:

> "Does a civil litigant, against whom summary judgment is sought, have the right to review evidence, including deposition testimony of witnesses, offered by the moving party against him, and, relatedly, (a) may discovery protective orders intended to limit disclosure of pre-trial discovery materials to 'attorneys eyes only' be

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confidential nature of the documents proffered by Defendants in support of this motion prohibit him from confronting his accusers; as such he is denied his constitutional rights under state and federal law, and hereby objects to the motion." Although incorrect, the State Court's statement about waiver helps frame a related issue which may be subsumed under the present issue presented of under what circumstances may a litigant's due process right to view evidence, including witnesses against him, and to have the opportunity to refute that evidence, be deemed waived.

> extended so as to permit the filing under seal of evidence in support of summary judgment without disclosure to the party himself against whom summary judgment is sought, (b) if such right exists, is it satisfied by disclosure to the party's attorney, where the attorney is barred from disclosing or discussing the protected material with his client, and (c) are there circumstances when such right of the litigant to view evidence and confront witnesses, and of the public, to have access to the evidence upon which public courts base decisions, may be deemed waived."

The Supreme Court of California on December 1, 1999, denied review of the decision below, and following issuance of *remittitur* by the California Court of Appeal, Second Appellate District, Division Six, on December 8, 1999, the judgment below, based on the grant of summary judgment and summary adjudication, and for which the Court had relied in part on sealed evidence which Petitioner was not able to personally review or have an opportunity to refute, was made final.

REASONS FOR GRANTING THE PETITION

The decision of the California Court of Appeal raises an important question of the extent to which due process requires that a party be made aware of and be given the chance to refute evidence introduced against him, and directly conflicts with the decisions of several United States Courts of Appeal, including the Ninth Circuit, in which California is located. Moreover, the decision below

is erroneous and the issue that it addresses is important and timely.

A. THE STATE COURT'S DECISION AND JUDGMENT IN THIS CASE CONFLICTS WITH DECISIONS OF FEDERAL COURTS THAT DUE PROCESS REQUIRES THAT A PARTY BE MADE AWARE OF AND BE GIVEN THE CHANCE TO REFUTE EVIDENCE INTRODUCED AGAINST HIM ON THE MERITS.

The decision by the United States Court of Appeals for the Ninth Circuit in *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), involved an action by an assistant professor, denied merit salary increases and tenure, who filed suit under the equal employment opportunity provisions of the Civil Rights Act of 1964, alleging sex discrimination. After a trial on the merits, the district court entered judgment in favor of the University, and the plaintiff appealed. The Court of Appeals found there was a denial of due process to the plaintiff, requiring reversal, where the plaintiff had requested at the discovery stage that the University produce the tenure review file and the district court issued a protective order and thereafter used the file as evidence while refusing to disclose the contents of the file to the plaintiff. *Lynn v. Regents*, 656 F.2d 1337, 1345-1346.

The court stated:

> The receipt and review by the district court of the tenure review file for the purpose of assisting it to make factual determinations or to evaluate other evidence violated principles of due process upon which our judicial system depends

> to resolve disputes fairly and accurately. The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court. Thus, the district court's receipt and review of the file, without disclosure of its contents to Lynn, requires reversal of the order of the district court. *Lynn v. Regents*, 656 F.2d at 1346.

A similar conclusion was reached by the Fifth Circuit in *Application of Eisenberg*, 654 F.2d 1107 (5th Cir. Unit B Sept. 1981), where the Court observed that, "Our adversarial legal system generally does not tolerate ex parte determinations on the merits of a civil case." *Application of Eisenberg, supra*, 654 F.2d at 1112. The right to due process "encompasses the individual's right to be aware of and refute the evidence against the merits of his case." *Ibid.*

The Eleventh Circuit has addressed the issue in the specific context of summary judgment, and has concluded that civil litigants have a due process right in being permitted to be aware of and refute the evidence against them, and that this right requires a reversal where evidence withheld from one party is relied upon by the court in deciding a summary judgment motion. *Vining v. Runyon*, 99 F.3d 1056 (11th Cir. 1996). Vining, a fired public employee, brought an action against the Postmaster General of the United States alleging termination on the basis of race and in retaliation for prior EEOC activity. In order to demonstrate that similarly situated white employees who committed nearly identical misconduct

were disciplined less severely than he was, Vining moved to compel production of his own personnel records and the personnel records of four white co-workers who, like himself, had either absence or tardiness problems. The Postmaster General's office opposed the motion, claiming that the information contained in the records was protected by the Privacy Act, 5 U.S.C. § 552a. The court ordered that the personnel files be produced for an *in camera* review by the court. After review of the files, the court denied Vining's motion to compel the documents as moot and granted the Postmaster General's motion for summary judgment, noting such evidence as the lack of any disciplinary letters in one of the files. *Vining v. Runyon*, 99 F.3d 1056, 1057.

Finding that the district court had relied upon the personnel records in ordering summary judgment for the defendant, the Court of Appeal reversed the judgment and remanded the case for a reconsideration of the summary judgment motion and Vining's motion to compel. *Id.*, at 1058. In doing so, the Court noted that on reconsideration by the district court the motion to compel should be determined first. If any of the documents were found to be outside the ambit of the Privacy Act, and thus discoverable, they were to be provided to Vining in order to allow him to review the materials and file any necessary opposing affidavits before the court reconsidered the summary judgment motion. If, on the other hand, the district court were to determine that the files were protected by the Privacy Act and were not discoverable, then

the district court should reconsider the summary judgment motion without relying on the information contained in the files.[4] *Id.*, at 1058.

Similar logic applies in the case at bar. Petitioner should be afforded an opportunity, by reason of the due process clause, to be aware of and refute the evidence being submitted against him on the merits of his case. If the evidence is private and/or confidential to such a degree that its discovery is shielded by a protective order, barring Mr. Kokkonen from learning its nature, principles of due process required that Respondents should have been prohibited from introducing the evidence for the purpose of consideration on the merits. Alternatively, if they felt it necessary to introduce the material as evidence on the merits, they should have been compelled to waive their right under the protective order to prevent disclosure to Petitioner, Mr. Kokkonen.

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[4] The Eleventh Circuit did find certain limits on this right of due process, which were culled from this Court's decision in a case outside the standard civil context, in the area of deportation rights: Although a judge freely may use *in camera, ex parte* examination of evidence to prevent the discovery or use of evidence, consideration of *in camera* submissions to determine the merits of litigation is allowable only when the submissions involve compelling national security concerns or the statute granting the cause of action specifically provides for *in camera* review of the dispute. *Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996), citing *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1, 108 S.Ct. 252, 98 L.Ed.2d 1 (1987). Neither of these limitations on the due process right to be aware of and refute opposing evidence is present in the matter herein.

B. DUE PROCESS PRINCIPLES REQUIRING THAT A PARTY BE PERMITTED TO BE AWARE OF THE EVIDENCE AGAINST HIM ARE NOT SATISFIED BY DISCLOSURE TO THE PARTY'S ATTORNEY ALONE.

The California Court of Appeal concluded that Petitioner's due process right was "waived because . . . his attorneys had the documents." (Appendix B-14.) The Court further attempted to distinguish the Ninth Circuit's decision in *Lynn* on the basis that in *Lynn,* the documents upon which the Court relied had not been disclosed to either plaintiff or counsel. (Appendix B-14.)

Decisions concerning the right of an individual to be present at his trial make it clear that the fact that Petitioner has been prevented from being able to view and refute the evidence submitted against him in conjunction with Respondents' summary judgment motion is not rendered permissible under the due process clause by the fact that the evidence was "attorneys' eyes only" and could be viewed by Petitioner's counsel. This area of law was discussed with respect to civil litigants in *Helminski v. Ayerst Laboratories,* 766 F.2d 208 (6th Cir. 1985). The Court observes that a civil litigant's right to be present at his trial derives from both the Fifth Amendment due process clause and the Seventh Amendment guarantee of a right to a jury trial in civil cases. *Helminski,* 766 F.2d at 213. The Court then states that, "We believe that the extent of a civil litigant's right to be present at trial is appropriately analyzed under the due process clause of the Fifth Amendment." *Ibid.*

> "Nonetheless, since an attorney is merely the representative or agent of the litigant and

> not the litigant's *"alter ego," Carlisle v. County of Nassau*, 64 App.Div.2d 15, 19, 408 N.Y.S.2d 114, 117 (1978), a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment. *Cf. Fillippon*, 250 U.S. at 81, 39 S.Ct. at 436; see *Snyder v. Lehigh Valley Railroad Co.*, 245 F.2d 112, 114-15 (3d Cir. 1957) (*en banc*); *Arrington*, 114 F.2d at 823." *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 213.

The Court then proceeds with a review of cases imposing some limit on a civil litigant's right to be present at trial, and determines that a litigant may be excluded involuntarily only where the litigant is of diminished mental state to such an extent that he is unable to comprehend the proceedings and aid counsel, or the party is guilty of disruptive behavior. "[A]bsent disruptive behavior, involuntary exclusion of a party who is able to comprehend the proceedings and aid counsel would constitute a denial of due process since exclusion of such a party would deny him the right to obtain a fair trial." *Helminski*, 766 F.2d at 217.

Similarly, "a party's right to attend a deposition has a constitutional dimension and is therefore entitled to special protection." *Hines v. Wilkerson*, 163 F.R.D. 262, 266 (S.D. Ohio 1995) [also, at 265, citing *Helminski* for the proposition that "a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel."] The court then reviews the cases regarding barring a party from attendance at a deposition, which state that it "should be a rare event",

should be "under rather extraordinary circumstances", or involve "unusual situations." *Hines*, 163 F.R.D. at 266.

Thus, in both the context of presence at trial and presence at the deposition of another party, attendance and participation of counsel is not considered a substitute for attendance and participation of a party. This is so even in the context of a deposition, where the party will subsequently be able to review the transcript and offer his observations to his counsel at that time. In the matter herein, no such participation by Mr. Kokkonen was possible. He was entirely excluded from the efforts to analyze, refute and oppose the "attorneys' eyes only" evidence submitted by Respondents.

As shown by the analysis in *Helminski*, the key for purposes of due process is the right of the litigant to be able to comprehend the proceedings and advise and aid his counsel. *Helminski*, 766 F.2d 208, 217. Petitioner was completely denied that right.

C. A PRE-TRIAL DISCOVERY PROTECTIVE ORDER STIPULATION DOES NOT CONSTITUTE WAIVER OF THE DUE PROCESS RIGHT TO PARTICIPATE IN REFUTING EVIDENCE.

The *Helminski* Court notes that the foregoing right to participation by the litigant at trial can only be relinquished by a knowing and voluntary waiver. The Confidentiality Stipulation and Order entered in this matter, by its own terms, addressed pre-trial discovery, not the admissibility of evidence at trial, or in connection with the summary judgment motions. Likewise, even the

onerous order entered on August 12, 1996, on discovery motions, which had excluded Petitioner from even attending the hearing and which expressly provided that "none of the documents or information contained in the documents shall be revealed to Plaintiff", expressly limited the effect of that bar by providing that that exclusion "applies for pre-trial discovery purposes only, which shall not affect the trial court's ability to determine the admissibility of such evidence at the time of trial." Clearly, the Discovery Commissioner had no intention of his order prohibiting the Petitioner's right to review evidence at trial, or other determination on the merits. Nowhere is there a waiver by the litigant of his right or opportunity to see evidence that is to be introduced at trial or a motion for summary judgment for consideration by the trier of fact in adjudicating the merits of Plaintiff's claim. Indeed, in the event the due process right of a litigant to be aware of and to refute the evidence on the merits against him can be waived at all, Petitioner submits it would have to be clear and unmistakable in light of the Constitutional rights at stake.

D. THE QUESTION PRESENTED IS IMPORTANT AND TIMELY.

The question presented, whether "attorneys' eyes only" restrictions embodied in protective orders to shield pre-trial discovery from parties, can and should be construed to preserve that confidential and protected status, even when offered as evidence, and relied upon by courts in reaching judgments, is one of increasing importance to courts and litigants. "[P]rocedural due process notice and

hearing requirements have 'ancient roots' in the rights to confrontation and cross-examination. . . . [F]airness can rarely be obtained by secret, one-sided determination of facts as decisive of rights." (*American-Arab Anti-Discrimination v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995).)

Protective orders, once the exception in pre-trial discovery, are being used with increasing frequency in civil litigation, and have become a mainstay in most business litigation. Protective orders now are expressly countenanced by both statute and rule,[5] and offer a way that the expansive scope of pre-trial discovery can be reconciled

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[5] For example, Federal Rule of Civil Procedure 26(c) expressly recognizes protective orders and provides for certain protocols with respect to filing evidence under seal (FRCP 26(c)(8)), that depositions may be sealed (FRCP 26(c)(6)) and that discovery be conducted with only persons designated by the court present (FRCP 26(c)(5)). Similarly, the Federal Judicial Center in its publication Manual For Complex Litigation, 3rd (1995), discusses limitations on disclosure and protective orders: "Complex litigation will frequently involve information or documents a party may consider sensitive. Two alternative approaches are available for seeking protection for such material: one or more parties may seek 'umbrella' protective orders, usually by stipulation, or the claim to protection may be litigated document by document. . . . When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document by document adjudication." Federal Judicial Center, Manual For Complex Litigation, 3rd (1995), page 67. The Federal Judicial Center includes sample protective orders, which include provisions allowing and governing the use of confidential information to be offered as evidence in trial or court hearings, including expressly providing for *in camera* inspections in some situations. See, *e.g.*, Section 41.36, page 455, Manual For Complex Litigation, 3rd (1995).

with legitimate concerns of the parties that not all the material produced in discovery would effectively become public, especially in ligation where the parties might be business competitors. As such, protective orders facilitate and are an important tool in implementing discovery.

The breadth of material developed and produced in discovery is typically much greater than the scope of material which might actually be admissible as evidence at a trial, and most, if not all, trial attorneys have assumed and understood that those documents and the testimony which were eventually introduced at trial would lose their protected status.

The federal courts have arguably seen more extensive use of protective orders, and the related procedure of *in camera* review of sensitive documents than the state courts. This is due in part to the fact that federal courts are often the forums of choice for intellectual property litigation, which addresses trade secrets and other sensitive information, as well as a host of other cases ranging from deportation proceedings to prosecutions under the Economic Espionage Act, in which federal courts have had to balance the potential release of commercially valuable information with the litigant's due process rights.

Although criminal in nature, the federal government's increasing number of prosecutions under the Economic Espionage Act (18 U.S.C. § 1831, *et seq.*) illustrate well the conflicting pressures on the courts. Due to the recent increase in trade secret theft, Congress enacted the Economic Espionage Act of 1996, 18 U.S.C. §§ 1831, *et seq.* The Act, which provides for criminal prosecution of industrial trade secret theft, presents the danger that

victim companies will be victimized further as a result of the prosecution itself, since the victim has no control over the manner of litigation by the prosecutor. The Act has resulted in approximately two dozen prosecutions to date, most of which have required courts to address how, on one hand, to allow a prosecution for theft of trade secrets, while at the same time trying to prevent the public release of the very information which the Act was intended to protect. The issues that are discussed in early decisions under the Act, and are likely to continue, raise due process questions which are similar to the issues in this case. See, *e.g.*, *United States v. Kai-Lo Hsu*, 155 F.3d 189, 197 (3d Cir. 1998) (Appealing decision reported at 982 F.Supp. 1022 (Ed. Pennsylvania 1997)). The defendant in these kinds of matters will be attempting to learn further details about the trade secret in discovery, as well as the nature and degree of protective measures instituted by the victim company to preserve the secrecy of the process or information alleged to have been stolen. The defendant is then likely to attempt to introduce this information at trial, in order to demonstrate that the process or information was not treated as secret by the victim company, or to show that the process or information is valueless, or to show that the process or information was already common knowledge throughout the industry. The prosecutor's highest priority in countering these procedural maneuvers is likely to be litigation efficiency directed toward successful conviction, whereas the victim company's highest priority is likely to be preservation of secrecy at all costs, including maximum resistance to both discovery and the introduction of evidence. The use of protective orders will be of great importance in

charting the course of litigation among these competing rights and priorities.

The Court of Appeals for the Third Circuit has observed that the provisions of the Act provide a "a clear indication from Congress that trade secrets are to be protected to the fullest extent during EEA litigation." *U.S. v. Hsu*, 155 F.3d 189, 197 (3d Cir. 1998). This serves to increase the tension between the victim's right to preserve secrecy and the defendant's due process rights to be made aware of information relevant to the prosecution and defense of the case against him. This leads to an increased need for the use of protective orders such as the one at bar, recognizing that certain evidence is sufficiently relevant that it should be produced, but is so sensitive that the victim wishes to keep it secret from the defendant – who is presumably a commercial competitor or someone in a position to transmit information to a commercial competitor.

Petitioner contends that there is a pressing need for the Court to issue guidelines in this area, making it clear that the interest in protecting alleged trade secret information does not justify concealment of the information from a party when it has been introduced by the opposition with regard to the merits of the action, even when the evidence is available to the party's counsel, since counsel is not the party's *"alter ego"* in all respects, and because an individual has the right to be made aware of the evidence introduced against his cause and to aid his counsel in countering such evidence. It is necessary to make it clear that – whether in a civil or criminal context – "attorneys' eyes only" disclosure is insufficient disclosure to permit the use of evidence on the merits.

In response to their experience in dealing with sensitive information, the federal courts, while creatively using *in camera* review and redaction, where possible, have collectively enunciated a firm and clear policy that where protected materials are considered and used as evidence, there must be disclosure to the parties of the evidence submitted to the court. See, *e.g., Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981).

State courts are increasingly having to address similar issues, but there is a dearth of comparable state authority on balancing the use of secret evidence with the federal constitutional mandates of due process. In the present case, the Court of Appeal decision, which the California Supreme Court declined to review, found that the Trial Court's consideration of and reliance on evidence submitted under seal, and of which Petitioner had no knowledge or opportunity to review, was permissible, or, alternatively, waived. This approach is at variance with those of the United States Courts of Appeal which have addressed the issue, including the Fifth, Ninth and the Eleventh Circuits, and the Petitioner submits that, where such secret evidence is relied upon and results in an adverse judgment and loss of property, has an unmistakable federal constitutional dimension.[6]

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[6] Interestingly, Respondent Guardian's general agent, Carl Hagmaier, who succeeded Matt Kokkonen in the San Luis Obispo office, and is a Respondent in this action, and whose deposition was one of those from which Petitioner was excluded, and the transcript restricted to "attorneys' eyes only", subsequently after entry of judgment in this matter, was terminated by The Guardian, and his insurance license revoked by the State of California in 1998. He subsequently was charged

In addition to the prejudice to the party denied access to the evidence, the practice of admitting and considering evidence which then is not part of a publicly accessible record also raises important policy issues regarding the privatization of public courts. This Court has considered the implications for the public interest of such practices as *vacatur* and stipulated reversals. If parties who resort to the public court system can, in effect, shield the factual evidence on which trial courts make their decisions, it will reduce public scrutiny of judges and courts, interfere with the evolution of and self-tuning inherent in a common law-based system, and by not allowing public examination of whether the evidence, in fact, supports and warrants the decision, place the perception of the legitimacy of the judicial function on blind faith, rather than observable performance.

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in a criminal action brought by the United States Attorney for the Central District of California, in which Hagmaier entered guilty pleas to mail fraud, embezzlement, making false statements to a financial institution, and having subscribed to false tax returns. That guilty plea and the Statement of Facts submitted to the court by Hagmaier as the basis for his plea, admitted many of the same false representations to insurance and financial planning clients which had formed the basis of Petitioner's original suit and, in fact, directly contradicts many of the statements Hagmaier made at his deposition. One may speculate that had the Petitioner been present or had the opportunity to review that transcript, it may either have deterred Mr. Hagmaier's misstatements, or resulted in their earlier discovery. This anecdote illustrates the importance and value to the adversary system that each side have full access to the evidence of the other.

This Court, by its review of the State Court decision in this case, can provide guidance to practitioners, litigants, and courts with respect to balancing privacy and protection of sensitive information on one hand, while maintaining a viable and fair adversarial system on the other, including whether disclosure to the parties of evidence submitted to a court is constitutionally mandated, and whether evidence admitted and relied upon in reaching a judicial decision should be part of a publicly accessible record. The manner in which that balance is struck is likely to have significant effects on the quality and vigor of informed argument, which leads to fair, accurate resolutions perceived as legitimate by parties and public alike.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

DATED: February 29, 2000.

Respectfully submitted,

MICHAEL REYNOLDS JENCKS,
Counsel of Record
STEPHEN BARRY
JENCKS LAW GROUP
Counsel for Petitioner

APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

MATT T. KOKKONEN,	) 2d Civil No. B111986
Plaintiff and Appellant,	) (Super. Ct. No. CV70630)
v.	) (San Luis Obispo County)
CARL J. HAGMAIER et al.,	)
Defendants and Respondents.	) (Filed Aug. 25, 1999)

An insurance company fires an insurance agent. The agent sues the company and others for wrongful termination, interference with prospective business advantage and fraud, among other things. The company is granted a directed verdict on the interference claim. The remainder of the case is settled and dismissed with prejudice.

The agent sues the company and others again alleging breach of employment contract, interference with prospective business advantage, unfair business practices, unfair competition and trade libel, among other things. The gist of the action is that the insurance company sought to destroy his wherewithal to act as an insurance agent after it fired him. The trial court granted the insurance company's motions for summary adjudication and summary judgment.

Matt T. Kokkonen appeals from the summary judgment and other orders entered in favor of respondents The Guardian Life Insurance Company of America (Guardian Life), Pacific Financial Group (PFG), Carl J.

Hagmaier, Dennis P. d'Autremont, Haven B. Sanson, Martin G. Hatley, Michael Ables and others (Guardian).[1] Respondents cross-appeal from the order of the trial court denying their motion to dismiss the case for lack of prosecution. We affirm.

FACTS

Kokkonen worked as an insurance agent for Guardian Life from 1975 until Guardian Life fired him in 1989 for lack of production. Kokkonen became an agent for Massachusetts Mutual Life Insurance Company (Mass Mutual), functioning under general agent Hal Mosher (Mosher). Kokkonen sued Guardian in state court for wrongful termination, interference with prospective business advantage, fraud and other causes (*Kokkonen I*). The case was removed to federal court and proceeded to trial. The court granted Guardian's motion for directed verdict on the interference claim. On March 5, 1992, the parties settled the remainder of the case on the record before the trial judge, stipulating to a mutual dismissal with prejudice which was filed with the court.

Meanwhile, on September 30, 1991, Kokkonen filed in state court the instant action. About two years later, Kokkonen filed the operative, first amended complaint alleging: (1) libel, (2) slander, (3) trade libel, (4) interference with contractual relations, (5) interference with prospective business advantage, (6) unfair competition, (7) unfair

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[1] The other respondents are Guardian Insurance and Annuity Corporation (GIAC) and Guardian Investor Services Corporation (GISC).

business practices, (8) breach of the settlement agreement, (9) rescission of settlement agreement, (10) injunctive relief, (11) conversion, (12) retaliatory action, and (13) breach of employment contract (*Kokkonen II*).

Respondents moved for judgment on the pleadings on the grounds of res judicata as to all but the causes for breach and rescission of the settlement agreement (the eighth and ninth causes of action). The trial court granted the motion as to the causes for slander, interference with contractual relations, conversion, retaliatory action and breach of the employment contract. The court also granted the motion as to the unfair competition and practice causes, except for acts allegedly occurring after *Kokkonen I* had concluded.

The court denied the motion on the libel claim, but struck all allegations except those regarding two letters written by Hagmaier to Mosher (the Mosher letters). The court denied the motion regarding trade libel, interference with prospective business advantage and injunctive relief. Guardian Life cross-complained for breach of the settlement agreement.

Respondents moved for summary adjudication and summary judgment.[2] The trial court granted the motions and entered judgment. This appeal and cross-appeal ensued.

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[2] Hagmaier and PFG, represented by separate counsel, joined in the motion made by the Guardian respondents and d'Autremont. Respondents Ables, Sanson and Hatley joined Guardian's motion and filed their own motion.

DISCUSSION

Whether Judgment Appealable

The parties point out that the summary judgment entered does not resolve all issues between the parties because Guardian Life filed a cross-complaint against Kokkonen that remains outstanding. The cross-complaint only alleges that Kokkonen breached the settlement agreement by failing to return Guardian files and continuing to communicate with Guardian regarding its policy holders.

At one time the appeal as to the cross-complaint could have proceeded in the discretion of the Court of Appeal in the interest of justice. (See generally, *DeGrandchamp v. Texaco, Inc.* (1979) 100 Cal.App.3d 424, 431-437; *American Nat. Bank v. Stanfill* (1988) 205 Cal.App.3d 1089, 1095-1096.)

This is no longer the case. *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 holds that "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties. . . . " Appeals that attempt to do so run afoul of the one final judgment rule in Code of Civil Procedure section 904.1, subdivision (a).[3] (*Morehart, supra,* at p. 740.) But, "[a] petition for a writ, not an appeal, is the authorized means for obtaining review of judgments and orders that lack the finality required by [section] 904.1, subdivision (a)." (*Id.*, at pp. 743-744.)

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[3] All statutory references are to this code unless otherwise stated.

In its respondents' brief, Guardian specifically requested that we treat the appeal on the cross-complaint as a petition for writ review in the interest of judicial economy, citing *G.E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co.* (1992) 11 Cal.App.4th 318, 325-326. The parties have briefed the issues pertaining to the cross-complaint, and we agree that judicial economy would be best served by our deciding the matter. We therefore treat the appeal of Guardian Life's cross-complaint as a petition for writ review.

Guardian Life's cross-complaint alleges only one, tangential cause of action. The issue regarding retention of records is moot due to laches. The issue of communicating with Guardian is resolved by this opinion. The entire cross-complaint is therefore rendered moot.

Summary Judgment Standards

We independently review motions for summary adjudication of issues and summary judgment. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674.) Where a defendant has met his burden to show that a cause of action has no merit, the burden shifts to the plaintiff to establish that a triable issue of fact exists by setting forth specific facts aside from the pleadings. (§ 437c, subd. (o)(2); *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713-714.)

Unnecessarily protracted litigation has a chilling effect upon the exercise of free speech. Therefore, speedy resolution by means of a summary judgment motion is

favored in actions sounding in defamation, as here. (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 684-685; *Couch v. San Juan Unified School Dist.* (1995) 33 Cal.A.pp.4th 1491, 1498-1499.) Kokkonen must make a sufficient showing of malice to warrant submission to a jury. (*Good Government, supra,* at p. 685.) Additionally, he must show a "high probability" that he would ultimately prevail to survive the summary judgment motion. (*Couch, supra,* at pp. 1498-1499.)

Res Judicata

The trial court granted respondents' motion for judgment on the pleadings on the causes of slander, interference with contractual relations, conversion, retaliatory action and breach of contract based on the doctrine of res judicata.

Res judicata precludes relitigation of a cause finally determined between the parties or their privies. (§ 1908; *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 620.) Res judicata requires a final judgment on the merits as to the same cause of action at issue between the same parties or their privies. In determining whether the same cause of action is at issue, California courts consider whether the same primary right is at stake in the subsequent litigation by focusing on the harm suffered. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954; *Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174-1175.)

"California has consistently applied the 'primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action. . . . [¶] [T]he 'cause of action' is based upon the harm suffered, as

opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.' [Citations.]" (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795, italics added.)

Res judicata also bars matters that could have been litigated in the previous action, even if the second action invokes different legal theories, new facts or different forms of relief. (*Castro v. Higaki* (1994) 31 Cal.App.4th 350, 357; *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1357-1358; *Eichman v. Fotomat Corp., supra,* 147 Cal.App.3d at pp. 1174-1175.)

Kokkonen I resulted in a final judgment on the merits between the same parties or those in privity here. Kokkonen argues that the slander and interference with prospective business advantage causes are not subject to the bar of res judicata because the instant complaint concerns matters occurring after the trial in *Kokkonen I.* We disagree.

Slander

In both *Kokkonen I* and the instant action, Kokkonen alleges that respondents notified his clients that he is no longer authorized to place business with defendants with the purpose of creating the false impression that Kokkonen had engaged in questionable, unfair or possibly

illegal practices. The facts in both actions involve the same primary right.

Interference with Prospective Business Advantage

In *Kokkonen I*, the trial court granted Guardian's motion for directed verdict on the cause for interference with prospective business advantage. The court entered a final judgment with prejudice there. In the instant case, Kokkonen pled the same cause. Accordingly, the trial court properly granted summary judgment thereon due to res judicata.

Conversion

In both *Kokkonen I* and the instant complaint, Kokkonen alleges that respondents diverted and kept income due him for vested policy renewals by switching agent codes on the policies. The same primary right concerning loss due to conversion is involved in both actions.

Retaliation and Defamation

In both *Kokkonen I* and the instant complaint, Kokkonen alleges retaliatory acts damaging his reputation and business after Guardian Life terminated his agency agreement and his general agency, even though the parties had intended and agreed that Kokkonen would continue to service existing clients and produce new business as an agent for respondents. Again, the same harm stemming from retaliatory activities is alleged in both actions, supporting summary judgment on the grounds of res judicata.

Breach of the Settlement Agreement

In the thirteenth cause of action of the instant complaint, Kokkonen alleges that after Hagmaier, Hatley and Sanson left his agency in October 1989 to join PFG, an exclusive agency of Guardian Life, they breached agreements to maintain confidentiality and to pay his commissions. In *Kokkonen I*, Kokkonen could have pled the same losses due to these breaches of contract and fiduciary duty stated against these individual respondents. Indeed, Kokkonen did plead Guardian's breach of its fiduciary duty to pay renewal commissions in *Kokkonen I* in 1989 and thereafter. PFG and these other agents were in privity with Guardian Life during that time.

Discovery revealed no new, independent facts establishing loss of another primary right than previously litigated. The parties are the same or are in privity with those in *Kokkonen I*. As in the previous action, Kokkonen alleges damage due to withholding client files from him, recoding files to divert income from him and notifying former clients that he is not authorized to place business for respondents thereby creating the false impression that he engaged in unethical or illegal practices. Accordingly, the trial court properly granted summary judgment on the ground of res judicata.

Libel Per Se

Kokkonen alleges that two letters sent by Hagmaier to Mosher, his new supervising general agent at Mass

Mutual, are libelous per se.[4] "Libel is a false and unprivileged publication . . . which exposes any person to hatred . . . or which causes him to be shunned . . . or which has a tendency to injure him in his occupation." (Civ. Code, § 45.) Libel per se is "libel which is defamatory of the plaintiff without the necessity of explanatory matter . . . [and] is said to be a libel on its face." (Civ. Code, 45a; *Barnes-Hind, Inc. v. Superior Court*, (1986) 181 Cal.App.3d 377, 382.)

In determining whether a publication constitutes libel per se, we consider it as a whole, placing ourselves in the position of the reader under the circumstances. (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 17 [111 L.Ed.2d 1, 17]; *Rosenberg v. J. C. Penney Co.* (1939) 30 Cal.App.2d 609, 619.) If the "gist or sting" of the publication is true, the defendant has a complete defense to claims of defamation. (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 581-582.) If the statements published are expressions of opinion, they are not actionable. (*Id.*, at p. 581; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 686-687.) Whether a statement is reasonably susceptible to an interpretation that implies a provably false assertion of fact rather than an unprovable opinion is a question of law. (*Morningstar, supra*, at pp. 686-687.)

An action for libel is subject to the defense of the common interest privilege. Under the privilege, one may share information with another interested individual under the reasonable belief that such information affects

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[4] One letter was also signed by respondent d'Autremont.

an important interest of the recipient provided the communication is made without malice. (Civ. Code, § 47, subd. (c); *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203-1204; *Institute of Athletic Motivation v. University of Illinois* (1980) 114 Cal.App.3d 1, 7, 9, 11.) Once the defendant meets the burden of showing that the privilege applies, plaintiff must show malice. *(Lundquist, supra,* at pp. 1202-1203.)

In the first letter of September 26, 1990, Hagmaier informed Mosher that Kokkonen replaced current Guardian Life policies with Mass Mutual policies using "very questionable," albeit legal, practices. Hagmaier provided documentation to Mosher substantiating his concern. The second letter and its enclosures substantiate that Kokkonen mislead Guardian Life policy holders and urged Mosher to take proper steps to insure that his activities cease.

In his June 1996 deposition, Kokkonen admitted he replaced existing Guardian Life policies with Mass Mutual policies. Kokkonen did replace the policies as stated in the letters.

Kokkonen argues, however, that respondents' characterization of his actions as questionable, unethical or misleading constitutes libel per se. We disagree. The Mosher letters were written by two insurance agents of one company to the general agent of another sharing important ethical concerns about admitted replacement of their insureds' policies. These subjective statements of opinion proffered by insurance professionals in private letters are not actionable. (See *Savage v. Pacific Gas &*

Electric Co. (1993) 21 Cal.App.4th 434, 444-445.) The common interest privilege applies to preclude this cause of action.

Trade Libel

Kokkonen alleged that the statements in the Mosher letters constitute trade libel by maliciously disparaging the character and quality of his services in the insurance industry. (See and cf. *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 572; *Guess, Inc. v. Superior Court* (1986) 176 Cal.App.3d 473, 479; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 73.)

Trade libel requires a derogatory and false publication about another's goods or services inducing customers to avoid dealing with complainant so that he loses sales. (*Leonardini v. Shell Oil Co., supra,* 216 Cal.App.3d at p. 572; *Guess, Inc. v. Superior Court, supra,* 176 Cal.App.3d at p. 479; *Erlich v. Etner, supra,* 224 Cal.App.2d at p. 73.)

Here the statements at issue do not disparage Kokkonen's goods or services. They concern Kokkonen's character. The statements are not actionable as trade libel. Moreover, discovery and declarations submitted do not demonstrate any triable issue of fact about whether the Mosher letters induced customers to avoid doing business with Kokkonen or that he suffered damages as a direct result of the letters.

Cartwright Act

Kokkonen argues that respondents may have violated the Cartwright Act. (Bus. & Prof. Code, §§ 16700 et

seq.) The Cartwright Act prohibits combinations or conspiracies to perform illegal acts in restraint of trade damaging plaintiff. (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265-266.)

A "combination" is the concerted action of individuals or entities who maintain separate and independent interests. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543.) Combinations that restrict trade and prevent competition are illegal and support a private cause of action. (Bus. & Prof. Code, §§ 16720, 16726, 16750.)

Kokkonen asserts that the PFG partnership, an exclusive agency for Guardian Life, could combine with GISC or GIAC in the sale of insurance and investment products. Kokkonen also asserts that individual employee defendants of Guardian Life may combine with other Guardian defendants to restrain trade in violation of the Cartwright Act or that PFG and its agents may do so. We disagree.

A corporation cannot conspire with its own agents. (*Roth v. Rhodes, supra,* 25 Cal.App.4th at pp. 543-544; *G.H.I.I. v. MTS, Inc., supra,* 147 Cal.App.3d at p. 266; *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 720.) A parent corporation cannot conspire with its wholly owned subsidiary. (*Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752, 771 [81 L.Ed.2d 628, 643].) Employees and agents of a corporation are not independent entities for purposes of the Cartwright Act. GISC and GIAC are wholly owned subsidiaries of Guardian Life.

PFG was a partnership acting solely as a general agent for Guardian Life in San Luis Obispo. The individual respondents were all employees of Guardian Life. As a matter of law, respondents could not have combined for purposes of the Cartwright Act.

Respondents established a prima facie defense. Kokkonen failed to show specific facts beyond his pleadings to establish a material, triable issue of fact. He concedes that he has no knowledge that respondents fixed or changed prices or whether their alleged conduct had any impact on the market. (§ 437c, subd. (o)(2); also see generally, *Ron Tonkin Gran Turismo v. Fiat Distributors* (9th Cir. 1981) 637 F.2d 1376, 1387-1388 [allegation of manufacturer's refusal to give distributorship to retailer does not show restraint of trade within meaning of Cartwright Act on summary judgment].)

False Advertising

Kokkonen's false advertising claims do not create a triable issue of fact and are barred for laches. He alleges negligent dissemination of misleading statements. The only statement he provides to support the claim is that d'Autremont told Kokkonen's former clients that Kokkonen lost prior litigation with Guardian. The statement does not constitute advertising. "Advertising" under Business and Professions Code section 17500 requires a statement made relating to the sale of a product or service. (And see generally, *Chern v. Bank of America* (1976) 15 Cal.3d 866, 875-876.)

Moreover, Kokkonen's unexcused delay of six years in prosecuting the action constitutes laches foreclosing

him from the only relief available, equitable injunctive relief. (Bus. & Prof. Code, §§ 17535; *Chern v. Bank of America, supra*, 15 Cal.3d at p. 875; *Nutro Products, Inc. v. Cole Grain Co.* (1992) 3 Cal.App.4th 860, 866; and see generally, *Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn.* (1979) 89 Cal.App.3d 889, 894-896.)

Breach of Settlement Agreement

Kokkonen claims that respondents violated confidentiality provisions mentioned in settling *Kokkonen I*. The record reveals that the parties had only an informal, "gentleman's agreement" or understanding not to discuss the settlement in the community. Such agreements are unenforceable and the claim was properly dismissed. (*Howell v. City of Hamburg Co.* (1913) 165 Cal. 172, 178-179.).

Rescission

Kokkonen argues that the settlement agreement should be rescinded because it illegally requires him to turn over his agent files to Guardian Life and precludes him from communicating with Guardian. We disagree.

Insurance Code section 10508.5 provides, in pertinent part, that "[i]t shall be the obligation of each life . . . insurance agent . . . and insurer to preserve and maintain all applicable records . . . in his or her possession, in addition to those records transmitted to the insurer, . . . for a minimum of five years." The settlement agreement, requiring Kokkonen to transmit agent files he had

to Guardian Life as of April 6, 1992, does not violate section 10508.5. The agreement would not preclude him from keeping copies of the files. Furthermore, because Guardian Life terminated him in October 1989, the section became inapplicable to records he kept as of October 1994 when Guardian Life filed its cross-complaint as to this issue.

Additionally, the California Fair Claims Settlement Practices Regulations only require insurance agents to transmit notices of *claims* to the insurer. (Cal. Code Regs., tit. 10, ch. 5, subch. 7.5.) The settlement only precludes Kokkonen from keeping certain Guardian Life files and from sending or providing forms to request information from Guardian; it does not preclude him from making claims.

Injunction

Because injunctive relief is a remedy, not a cause of action, Kokkonen appropriately stipulated to dismissal of this purported cause. (*Major v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623.)

Other Procedural Matters

Kokkonen contends that the trial court improperly granted summary judgment before considering material facts that were the subject of pending discovery. (§ 437c, subd. (h); *Pacific Architects Collaborative v. State of California* (1979) 100 Cal.App.3d 110, 126-127.) But Kokkonen did not request any continuance of the hearing on the motion. (*Lewinter v. Genmar Industries, Inc.* (1994) 26

Cal.App.4th 1214, 1224.) The trial was set more than five years after the complaint had been filed. Kokkonen did not make a sufficient showing to justify delay beyond the first day of trial when the motion was heard. After years of discovery, the trial court found that his delay in prosecution was not excusable. (See generally, *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 356.)

Kokkonen inappropriately complains that he did not have time to adequately prepare his case and cites section 437c, subdivision (a), which precludes hearing summary judgment motions within 30 days of the date set for trial except for good cause shown.

Kokkonen opines that his due process right to confrontation was violated because he was precluded from reviewing and responding to certain documents proffered in support of the summary judgment motion. The objection is waived because he stipulated that the documents were confidential, his attorneys had the documents and he is making the objection for the first time on appeal.

His reliance on *Lynn v. Regents of the University of California* (9th Cir. 1981) 656 F.2d 1337 is misplaced. In *Lynn*, the trial court reviewed documents in camera which had never been disclosed to plaintiff or counsel. (*Id.*, at pp. 1345-1346.)

Alleged Bias of Judge Coffee

Kokkonen contends that Judge Coffee, who heard the motion for judgment on the pleadings in 1994, was biased because Hagmaier and PFG collected commissions as the

general agent on a policy Judge Coffee held with Guardian Life. This contention is without merit.

Judge Coffee disclosed that he was the named insured in a Guardian life insurance policy placed with a local agent around 1992. Kokkonen concedes that the purported lack of disclosure concerning Hagmaier and PFG was likely due to Judge Coffee's inadvertence and lack of information about the general agency. One cannot be biased if one is unaware of such facts.

Kokkonen claims that he had not challenged Judge Coffee for cause because he did not know of the relationship between Judge Coffee and the other defendants. As a former general agent of Guardian Life, Kokkonen must have known that any policy placed with Guardian around that time would have listed Hagmaier as the general agent and PFG as the general agency. Kokkonen decided not to challenge Judge Coffee for cause and the issue is waived.[5]

Cross-appeal

Respondents cross-appeal from the interlocutory order of the trial court denying their motion to dismiss Kokkonen's first amended complaint for lack of prosecution. (§§ 583.410, 583.420, subd. (a)(2); Cal. Rules of Court, rule 373(e).)

We review the denial of a motion to dismiss for lack of service within two years under the abuse of discretion

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[5] Justice Coffee has recused himself from hearing this appeal.

standard. (*American Western Banker v. Price Waterhouse* (1993) 12 Cal.App.4th 39, 46.) We presume the trial court's order is correct and indulge every inference in support of its validity. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443; *American Western Banker, supra,* at p. 46.) The legislative policy favors resolution of disputes on the merits over the policy of diligence in prosecution underlying the dismissal statute. (*Howard, supra,* at p. 440.) A respondent must show prejudice and the probability of a more favorable outcome on a discretionary dismissal claim. (See generally, *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195.)

Here the initial complaint was filed September 30, 1991. The instant first amended complaint was filed on August 3, 1993. All of the defendants except for *Sanson* were served within two years of the filing of the initial complaint. Sanson was served 12 days after the two-year period. The suit was removed to federal court then remanded to state court. Some discovery ensued regarding production of documents and answering interrogatories, among other things. After the trial court denied the motion to dismiss, respondents petitioned this court for a writ of mandate to compel dismissal. We denied the writ and the matter proceeded to summary adjudication and summary judgment.

Although Kokkonen could have been more diligent, the trial court did not abuse its discretion in denying the motion to dismiss the case. There were extenuating circumstances relating to the aftermath of *Kokkonen I,* respondents were well aware of the issues presented by the case and Guardian Life filed a cross-complaint to it regarding the settlement of *Kokkonen I.* Respondents were

not prejudiced by the delay. After obtaining judgment on the pleadings on many causes in 1994, the instant complaint has now been fully resolved on the merits by summary judgment.

The judgment is affirmed. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, Acting P.J.

We concur:

YEGAN, J.

MATZ, J.*

Leighton Hatch, Judge*
Superior Court County of San Luis Obispo

Jencks Law Group, Michael R. Jencks and Cherie L. Evans for Plaintiff and Appellant.

Hanson, Bridgett, Marcus, Vlahos & Rudy and James A. Napoli for Defendants and Respondents Carl J. Hagmaier and Pacific Financial Group.

Thelen Reid & Priest, Robert A. Dolinko, Robert Spagat and Mary E. Wilcox for Defendants and Respondents The Guardian Life Insurance Company of America, Guardian Insurance and Annuity Corporation, Guardian

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*Assigned by the Chairperson of the Judicial Council.

*Retired judge of the Municipal Court for the Sacramento Municipal District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Investor Services Corporation, Dennis P. d'Autremont, Haven B. Sanson, Martin G. Hatley and Michael Ables.

ROBERT A. DOLINKO, State Bar No. 76256
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Attorneys for Defendants
DENNIS P. D'AUTREMONT, HAVEN B. SANSON, MARTIN G. HATLEY, MICHAEL ABLES, THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY CORPORATION, and GUARDIAN INVESTOR SERVICES CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR the COUNTY OF SAN LUIS OBISPO

MATT T. KOKKONEN, C.L.U., individually and doing business as THE MATT KOKKONEN INSURANCE AGENCY, Plaintiff, vs. CARL J. HAGMAIER, et al., Defendants.	Case No.: 70630 JUDGMENT PURSUANT TO ORDERS GRANTING SUMMARY JUDGMENT AND SUMMARY ADJUDICATION AND DISMISSING WITH PREJUDICE (Filed Mar. 7, 1997)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is hereby entered in favor of defendants The Guardian Life Insurance Company of America, Guardian Insurance and Annuity Corporation, Guardian Investor Services Corporation, Dennis P. D'Autremont, Haven B. Sanson, Martin G. Hatley, Michael Ables, Carl J. Hagmaier, and Pacific Financial Group and against plaintiff Matt T. Kokkonen, C.L.U., individually and doing business as The Matt Kokkonen Insurance Agency. Plaintiff's complaint in the action is hereby DISMISSED WITH PREJUDICE and plaintiff shall take nothing thereby. Defendant shall recover all costs allowable by law.

Dated: MAR 07 1997, 1997

/s/ LEIGHTON HATCH
San Luis Obispo Superior Court
Judge

ROBERT A. DOLINKO, State Bar No. 76256
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Attorneys for Defendants
DENNIS P. D'AUTREMONT, HAVEN B. SANSON, MARTIN G. HATLEY, MICHAEL ABLES, THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY CORPORATION, and GUARDIAN INVESTOR SERVICES CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR the COUNTY OF SAN LUIS OBISPO

MATT T. KOKKONEN, C.L.U., individually and doing business as THE MATT KOKKONEN INSURANCE AGENCY, Plaintiff, vs. CARL J. HAGMAIER, et al., Defendants.	Case No.: 70630 [PROPOSED] ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS MICHAEL ABLES, HAVEN B. SANSON, AND MARTIN G. HATLEY Date: November 12, 1996 Time: 9:00 a.m. Place: Veteran's Building (Filed Jan. 24, 1997)

Defendants MICHAEL ABLES, MARTIN G. HATLEY, and HAVEN B. SANSON's, ("Defendants' ") motion for summary judgment was heard by this court on November 12, 1996. The law firm of Thelen, Marrin, Johnson & Bridges LLP appeared as attorneys for the three Guardian entities and defendants d'Autremont, Ables, Hatley and Sanson. The law firm of Hanson, Bridgett, Marcus, Vlahos & Rudy appeared for defendants Pacific Financial Group and Carl Hagmaier. The law firm of Jencks, Bonitz & Vella appeared for Plaintiff Matt T. Kokkonen ("Plaintiff").

The Court considered all materials submitted in support of and in opposition to said motion, except: (1) any

and all evidence ordered stricken pursuant to Defendants' motion to strike untimely filed evidence; and (2) inadmissible evidence to which timely objections were filed. The Court also heard oral argument of counsel. Now, therefor, good cause appearing, the Court hereby finds as follows:

1. Defendants' separate motion is granted as a supplement to their being granted similar relief for the grounds set forth in the Court's Orders Granting Summary Judgment and Summary Adjudication for all defendants.

2. There are no triable issues of material fact within the standard set forth in C.C.P. § 437c.

3. Defendants have established that they are entitled to summary judgment for the following reasons:

1. Conspiracy

Plaintiff alleges that the Defendants are liable for all of the acts of the other defendants because they were participants in a conspiracy to commit torts against plaintiff. However, plaintiff has failed to create a triable issue of fact as to whether defendants participated in such a conspiracy.

In support of his conspiracy theory, plaintiff cites the deposition testimony of Defendant Hatley, and letters sent by the defendants. (Declaration of Kirk Wolden, Exh. B, at 76:3-61:20; Exh. C, Interrogatory Response Nos. 2 and 13.) Neither the deposition testimony nor the letters create a material issue of fact as to whether there was an agreement between the defendants to take any unlawful

actions. Rather the deposition testimony shows only that the defendants held lawful business meetings; the letters show that the defendants were attempting to compete fairly by encouraging Guardian insureds to keep their Guardian insurance policies in force. Accordingly, plaintiff has failed to create a triable issue of fact as to his conspiracy claim. *See e.g., Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1427.

Plaintiff's conspiracy claim also fails against the defendants because plaintiff failed to show that defendants did anything other than act as Guardian employees in the course and scope of their employment. Plaintiff concedes that the defendants were, at all relevant times, Guardian employees. (Plaintiff's Separate Statement, Facts 18-20.) Plaintiff contends that defendant Pacific Financial Group is a partnership, but he failed to create a material issue of fact as to whether, assuming this to be the case, that Pacific Financial Group had separate and independent interests from The Guardian or any of its agents and employees. Rather, plaintiff conceded the Pacific Financial Group is "intimately intertwined" with The Guardian Defendants. (Plaintiff's Opp. to The Guardian's motion for summary judgment, at 21:22-22:10.) As a matter of law, defendants could not conspire with any of the Guardian entities. *Black v. Bank of America* (1994) 30 Cal.App.4th 1. For this additional reason, plaintiff's conspiracy theory fails.

2. Defendant Ables

Plaintiff concedes that he has no separate evidence of alleged wrongdoing committed by Defendant Ables.

(Defendants' Exh. 12, at 1088:5-1090:12.) Because plaintiff's conspiracy claim fails, Defendant Ables is entitled to summary judgment.

3. Defendants Hatley and Sanson

Plaintiff's First Cause of Action for Libel Per Se fails against defendants Hatley and Sanson because it is limited to the two letters received by Harold K. Mosher, which were not written by either of these defendants. (Defendants' Exh. 3, Plaintiff's Opp. to The Guardian's motion for summary judgment, at 5:28, fn. 3; Exh. 10, Exh. 11.)

Plaintiff's Sixth and Seventh Causes of Action for Unfair Business Practices and Violation of Insurance Code section 790.03 are limited by this Court's Order on Motion for Judgment on the Pleadings of June 20, 1994, to acts occurring after the conclusion of the federal court action which was dismissed on April 13, 1992. Similarly, plaintiff's First Amended Complaint alleges that various acts constituting trade libel occurred in and after November 1991. (Defendants' Exh. 1, at ¶ 34.) Plaintiff concedes that defendants Hatley and Sanson both left their employment with The Guardian in early 1991. (Defendants' Exh. 18, at 34:25-35:3; Exh. 19, at 42:1-5.)

Plaintiff's remaining causes of action fail because they are limited to letters written by these two defendants, and plaintiff has failed to create a triable issue of

fact as to their falsity.[1] (Defendants' Exh. 6, at 2:6-9, Exh. 12, at 721:1-722:1, 804:8-15, 1086:13-25, 1087:1-25, 1090:21-1092:19, Exh. 21, at 4:20-9:4, 30-34, 37, 38, 41.) Accordingly, defendants Hatley and Sanson are entitled to summary judgment.

IT IS THEREFORE ORDERED THAT Defendants MICHAEL ABLES, MARTIN G. HATLEY, and HAVEN B. SANSON'S motion for summary judgment is GRANTED as to each of plaintiff's causes of action against Defendants Ables, Hatley and Sanson.

Dated: JAN 24, 1997

/s/ L. Hatch
The Honorable Leighton Hatch
ASSIGNED

Respectfully Submitted:

Dated: January 7, 1997

THELEN, MARRIN, JOHNSON & BRIDGES LLP

By /s/ Robert Dolinko
Robert A. Dolinko
Marta R. Pierpoint
Robert Spagat

---

[1] The Eighth and Ninth Causes of Action, for breach of the settlement agreement and rescission, are pled only against co-defendant Guardian Life Insurance Company of America; not these defendants.

Attorneys for Defendants
DENNIS P. D'AUTREMONT,
HAVEN B. SANSON, MARTIN G.
HATLEY, MICHAEL ABLES,
GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA, THE
GUARDIAN INSURANCE AND
ANNUITY CORPORATION, and
GUARDIAN INVESTOR SERVICES
CORPORATION

Dated: January 8, 1997

SINSHEIMER, SCHIEBELHUT &
BAGGETT

By /s/ Roy E. Ogden
Roy E. Ogden
Attorneys for Defendants
DENNIS P. D'AUTREMONT,
HAVEN B. SANSON, MARTIN G.
HATLEY, MICHAEL ABLES, THE
GUARDIAN LIFE INSURANCE
COMPANY OF AMERICA,
GUARDIAN INSURANCE AND
ANNUITY CORPORATION, and
GUARDIAN INVESTOR SERVICES

PROOF OF SERVICE BY MAIL

I am over age 18, not a party to this action, and am employed in San Luis Obispo County at Sinsheimer, Schiebelhut & Baggett, 1010 Peach Street, Post Office Box 31, San Luis Obispo, California, 93406. On January 8, 1997, following ordinary business practices, I placed for collection and mailing at the offices of Sinsheimer, Schiebelhut & Baggett, located at 1010 Peach Street, San Luis Obispo, California, a copy of the attached **"[Proposed]**

Order Granting Summary Judgment for Defendants Michael Ables, Haven B. Sanson, and Martin G. Hatley" in a sealed envelope, with postage fully prepaid, addressed to:

James Napoli, Esq.
Hanton, Bridgett, Marcus, Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105

I am readily familiar with the business' practices for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Dated: January 8, 1997
at San Luis Obispo, CA

/s/ Kelly Anne West
KELLY ANNE WEST

PROOF OF SERVICE BY HAND-DELIVERY

I am a citizen of the United States and am employed in the City and County of San Luis Obispo; I am over the age of 18 years and am not a party to the action entitled on the document to which this certificate is attached; my business address is Sinsheimer, Schiebelhut & Baggett, 1010 Peach Street, Post Office Box 31, San Luis Obispo, California 93406. I am employed by an attorney permitted to practice before this Court.

I served the foregoing **"[Proposed] Order Granting Summary Judgment for Defendants Michael Ables, Haven B. Sanson, and Martin G. Hatley"** on the parties named below by personally delivering a true copy of said document by hand on January 8, 1997, by 5:00 p.m.:

Michael R. Jencks, Esq.
Jencks, Bonitz & Vella
The Promontory
412 Higuera Street
San Luis Obispo, CA 93401

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Luis Obispo, California, on January 8, 1997.

/s/ Lynn Parmann
LYNN PARMANN

ROBERT A. DOLINKO, State Bar No. 76256
MARTA R. PIERPOINT, State Bar No. 135639
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

MATT T. KOKKONEN, C.L.U., individually and doing business as THE MATT KOKKONEN INSURANCE AGENCY, Plaintiff, vs. CARL J. HAGMAIER, et al., Defendants.	Case No.: 70630 **[PROPOSED] ORDER GRANTING SUMMARY ADJUDICATION FOR DEFENDANTS MICHAEL ABLES, HAVEN B. SANSON, MARTIN G. HATLEY, CARLTON J. HAGMAIER, AND PACIFIC FINANCIAL GROUP** Date: November 12, 1996 Time: 9:00 a.m. Place: Veteran's Building (Filed Jan. 24, 1997)

Defendants MICHAEL ABLES, MARTIN G. HATLEY, and HAVEN B. SANSON's, ("Defendant's") motion for summary adjudication of issues was heard by this court on November 12, 1996. The law firm of Thelen, Marrin, Johnson & Bridges LLP appeared as attorneys for the three Guardian entities and defendants d'Autremont, Ables, Hatley and Sanson. The law firm of Hanson, Bridgett, Marcus, Vlahos & Rudy appeared for defendants Pacific Financial Group and Carl Hagmaier. The law firm of Jencks, Bonitz & Vella appeared for Plaintiff Matt T. Kokkonen ("Plaintiff").

The Court considered all materials submitted in support of and in opposition to said motion, except: (1) any and all evidence ordered stricken pursuant to Defendants' motion to strike untimely filed evidence; and (2) inadmissible evidence to which timely objections were filed. The Court also heard oral argument of counsel. Now, therefor, good cause appearing, the Court hereby finds as follows:

1. Defendants' separate motion is granted as a supplement to their being granted similar relief for the grounds set forth in the Court's Order Granting Summary Adjudication for all defendants.

2. There are no triable issues of material fact within the standard set forth in C.C.P. § 437c.

3. Defendants have established that they are entitled to summary adjudication of each of plaintiff's causes of action for the following reasons:

1. Conspiracy

Plaintiff alleges that the Defendants are liable for all of the acts of the other defendants because they were participants in a conspiracy to commit torts against plaintiff. However, plaintiff has failed to create a triable issue of fact as to whether defendants participated in such a conspiracy.

In support of his conspiracy theory, plaintiff cites the deposition testimony of Defendant Hatley, and letters sent by the defendants. (Declaration of Kirk Wolden, Exh. B, at 76:3-81:20; Exh. C. Interrogatory Response Nos. 2 and 13.) Neither the deposition testimony nor the letters

create a material issue of fact as to whether there was an agreement between the defendants to take any unlawful actions. Rather, the deposition testimony shows only that the defendants held lawful business meetings; the letters show that the defendants were attempting to compete fairly by encouraging Guardian insureds to keep their Guardian insurance policies in force. Accordingly, plaintiff has failed to create a triable issue of fact as to his conspiracy claim. *See e.g., Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1427.

Plaintiff's conspiracy claim also fails against the defendants because plaintiff failed to show that defendants did anything other than act as Guardian employees in the course and scope of their employment. Plaintiff concedes that the defendants were, at all relevant times, Guardian employees. (Plaintiff's Separate Statement, Facts 18-20.) Plaintiff contends that defendant Pacific Financial Group is a partnership, but he failed to create a material issue of fact as to whether, assuming this to be the case, that Pacific Financial Group had separate and independent interests from The Guardian or any of its agents and employees. Rather, plaintiff conceded the Pacific Financial Group is "intimately intertwined" with the Guardian defendants. (Plaintiff's Opp. to The Guardian's motion for summary judgment, at 21:22-22:10.) As a matter of law, defendants could not conspire with any of the Guardian entities. *Black v. Bank of America* (1994) 30 Cal.App.4th 1. For this additional reason, plaintiff's conspiracy theory fails.

2. Defendant Ables

Plaintiff concedes that he has no separate evidence of alleged wrongdoing committed by Defendant Ables. (Defendants' Exh. 12, at 1088:5-1090:12.) Because plaintiff's conspiracy claim fails, Defendant Ables is entitled to summary adjudication of each of plaintiff's causes of action against him.

3. Defendants Hatley and Sanson

Plaintiff's First Cause of Action for Libel Per Se fails against defendants Hatley and Sanson because it is limited to the two letters received by Harold K. Mosher, which were not written by either of these defendants. (Defendants' Exh. 3, Plaintiff's Opp. to The Guardian's motion for summary judgment, at 5:28, fn. 3; Exh. 10, Exh. 11.)

Plaintiff's Sixth and Seventh Causes of Action for Unfair Business Practices and Violation of Insurance Code section 790.03 are limited by this Court's Order on Motion for Judgment on the Pleadings of June 20, 1994, to acts occurring after the conclusion of the federal court action which was dismissed on April 13, 1992. Similarly, plaintiff's first Amended Complaint alleges that various acts constituting trade libel occurred in and after November 1991. (Defendants' Exh. 1, at ¶ 34.) Plaintiff concedes that defendants Hatley and Sanson both left their employment with The Guardian in early 1991. (Defendants' Exh. 18, at 34:25-35:3; Exh. 19, at 42:1-5.)

Plaintiff's remaining causes of action fail because they are limited to letters written by these two defendants, and plaintiff has failed to create a triable issue of fact as to their falsity.[1] (Defendants' Exh. 6, at 2:6-9, Exh. 12, at 721:1-722:1, 804:8-15, 1086:13-25, 1087:1-25, 1090:21-1092:19, Exh. 21, at 4:20-9:4, 30-34, 37, 38, 41.) Accordingly, defendants Hatley and Sanson are entitled to summary judgment.

IT IS THEREFORE ORDERED THAT Defendants MICHAEL ABLES, MARTIN G. HATLEY, and HAVEN B. SANSON'S motion for summary adjudication of issues is **GRANTED** as to each of plaintiff's causes of action against Defendants Ables, Hatley and Sanson.

IT IS FURTHER ORDERED THAT Defendants Hagmaier and Pacific Financial Group, who joined in this motion, are granted summary adjudication in connection with plaintiff's cause of action for conspiracy.

Dated: JAN 24, 1997

/s/ Leighton Hatch
The Honorable
Leighton Hatch
ASSIGNED

---

[1] The Eighth and Ninth Causes of Action, for breach of the settlement agreement and rescission, are pled only against co-defendant Guardian Life Insurance Company of Amerca; not these defendants.

Respectfully Submitted:

Dated: January 7, 1997

THELEN, MARRIN, JOHNSON & BRIDGES LLP

By /s/ Robert A. Dolinko
Robert A. Dolinko
Marta R. Pierpoint
Robert Spagat
Attorneys for Defendants
DENNIS P. D'AUTREMONT, HAVEN B. SANSON, MARTIN G. HATLEY, MICHAEL ABLES, GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, and GUARDIAN INVESTOR SERVICES CORPORATION

Dated: January 8, 1997

SINSHEIMER, SCHIEBELHUT & BAGGETT

By /s/ Roy E. Ogden
Roy E. Ogden
Attorneys for Defendants
DENNIS P. D'AUTREMONT, HAVEN B. SANSON, MARTIN G. HATLEY, MICHAEL ABLES, THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY CORPORATION, and GUARDIAN INVESTOR SERVICES

PROOF OF SERVICE BY MAIL

I am over age 18, not a party to this action, and am employed in San Luis Obispo County at Sinsheimer, Schiebelhut & Baggett, 1010 Peach Street, Post Office Box 31, San Luis Obispo, California, 93406. On January 8, 1997, following ordinary business practices, I placed for collection and mailing at the offices of Sinsheimer, Schiebelhut & Baggett, located at 1010 Peach Street, San Luis Obispo, California, a copy of the attached "**[Proposed] Order Granting Summary Adjudication for Defendants Michael Ables, Haven B. Sanson, and Martin G. Hatley, Carlton J. Hagmaier, and Pacific Financial Group**" in a sealed envelope, with postage fully prepaid, addressed to:

James Napoli, Esq.
Hanson, Bridgett, Marcus, Vlahos & Rudy
333 Market Street, Suite 2300
San Francisco, CA 94105

I am readily familiar with the business' practices for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Dated: January 8, 1997
at San Luis Obispo, CA

/s/ Kelly Anne West
KELLY ANNE WEST

PROOF OF SERVICE BY HAND-DELIVERY

I am a citizen of the United States and am employed in the City and County of San Luis Obispo; I am over the age of 18 years and am not a party to the action entitled on the document to which this certificate is attached; my business address is Sinsheimer, Schiebelhut & Baggett, 1010 Peach Street, Post Office Box 31, San Luis Obispo, California 93406. I am employed by an attorney permitted to practice before this Court.

I served the foregoing "**[Proposed] Order Granting Summary Adjudication for Defendants Michael Ables, Haven B. Sanson, and Martin G. Hatley, Carlton J. Hagmaier, and Pacific Financial Group**" on the parties named below by personally delivering a true copy of said document by hand on January 8, 1997, by 5:00 p.m.:

Michael R. Jencks, Esq.
Jencks, Bonitz & Vella
The Promontory
412 Higuera Street
San Luis Obispo, CA 93401

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Luis Obispo, California, on January 8, 1997.

/s/ Lynn Parmann
LYNN PARMANN

Second Appellate District, Division Six, No. B111986
S082619

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

MATT T. KOKKONEN, Appellant

v.

CARL J. HAGMAIER Et Al., Respondents

(Filed Dec. 1, 1999)

Appellant's petition for review DENIED.

GEORGE
Chief Justice